

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CUMBRE, INC., a California corporation, and Coachella Valley Insurance Service, Inc., a California corporation,

Plaintiffs,

v.

STATE COMPENSATION INSURANCE FUND, a public enterprise fund,

Defendant.

No. C 09-02706 CW

ORDER DENYING
PLAINTIFFS' MOTION
FOR A PRELIMINARY
INJUNCTION AND
GRANTING DEFENDANT'S
MOTION TO DISMISS

On June 24, 2009, Plaintiffs Cumbre, Inc. and Coachella Valley Insurance Service, Inc., filed a motion for a preliminary injunction to require Defendant State Compensation Insurance Fund to admit Plaintiffs as approved State Fund brokers. On July 14, 2009, Defendant filed a motion to dismiss. Having considered oral argument and all of the papers filed by the parties, the Court denies Plaintiffs' motion for a preliminary injunction and grants Defendant's motion to dismiss.

BACKGROUND

Plaintiffs are both California corporations in the insurance brokerage business. Defendant is a public enterprise fund and

1 California agency organized under the Department of Industrial
2 Relations.¹ See Cal. Ins. Code § 11773; Cal. Lab. Code § 56.

3 On January 1, 2003, the parties entered into a written
4 contract which authorized Plaintiffs as brokers to obtain workers'
5 compensation insurance for its clients from Defendant. On April 2,
6 2003, Defendant notified Plaintiffs that it was terminating the
7 contract because their "book of business" produced a "consistently
8 unprofitable loss ratio." Defendant's Request for Judicial Notice
9 (RJN), Exh. 1 at ¶¶ 12, 17. Plaintiffs appealed the termination
10 decision to Defendant, but Defendant rejected the appeal. After
11 the termination, Plaintiffs were not permitted to place new
12 business with Defendant. However, Plaintiffs were allowed to
13 maintain their existing policies. In the year before the
14 termination, Plaintiffs' policies produced over \$1,425,000 in
15 commissions. After the termination, Plaintiffs' policies amassed
16 \$580,000 in commissions. On July 2, 2003, Plaintiffs filed suit
17 against Defendant in state court for damages from the termination.

18 In 2004, while the lawsuit was pending, Defendant offered to
19 reinstate all terminated brokers, including Plaintiffs, under the
20 condition that the brokers dismiss all lawsuits connected to the
21 2003 termination. The letter stated: "Brokerages engaged in
22 litigation with State Fund which arises in whole or in part out of
23 State Fund's termination of any brokers or State Fund's broker
24 rehabilitation program are not eligible for reinstatement."
25 Plaintiffs chose not to dismiss the lawsuit and they were not

26
27 ¹The Court grants Defendant's request to take judicial notice
28 of the court documents submitted in opposition to Plaintiffs'
motion for a preliminary injunction and in support of its motion to
dismiss.

1 reinstated. Plaintiffs then amended their complaint in state court
2 to allege a cause of action for violating 42 U.S.C. § 1983 claiming
3 that Defendant's reinstatement offer impeded Plaintiffs'
4 constitutional right of access to the courts guaranteed in the
5 petition clause of the First Amendment. The state court granted
6 Defendant's demurrer to the § 1983 claim concluding that § 1983
7 does not provide a cause of action against state agencies that
8 choose to impose conditions such as the instant reinstatement
9 condition. Plaintiffs amended their complaint again and asserted
10 that Defendant's reinstatement condition violated their fundamental
11 "right to petition the government for redress of grievances
12 provided for in the First Amendment to the United States
13 Constitution. RJN, Exh. 13, ¶ 58. Defendant demurred to that
14 cause of action and the state court granted the motion without
15 leave to amend. The short order on the motion did not discuss the
16 legal issues. RJN, Exh. 16.

17 The parties then cross-moved for summary judgment on the
18 remaining causes of action: (1) violation of the duty of fair
19 procedure; (2) unfair competition pursuant to California Business
20 and Professions Code §§ 17200 et seq.; and (3) intentional
21 interference with economic advantage. The state court granted
22 Defendant's motion, denied Plaintiffs' motion and dismissed the
23 case. Plaintiffs appealed. The court affirmed in part and
24 reversed in part the trial court's summary judgment order and
25 affirmed the trial court's grant of Defendant's demurrer to
26 Plaintiffs' § 1983 claim. The appellate court specifically
27 addressed Plaintiffs' argument that Defendant "impermissibly
28 infringed upon its constitutional right to petition the court for

1 redress of grievances.” RJN, Exh. 25 at 45. The court
2 “conclude[d] that [Plaintiffs] cannot establish that [Defendant’s]
3 conditional reinstatement offer resulted in a deprivation of a
4 constitutional right.” Id. at 47. The case was remanded for trial
5 on two claims: (1) violation of the duty of fair procedure and
6 (2) unfair competition. The violation of the duty of fair
7 procedure claim was tried before a jury, which found for Defendant;
8 and the §§ 17200 et seq. claim was tried before the court, which
9 also found for Defendant. The court entered judgment on June 5,
10 2009 and Plaintiffs filed a notice of appeal on July 9, 2009.

11 Meanwhile, on March 24, 2009, Plaintiffs filed another
12 application to be brokers for Defendant. On March 31, 2009
13 Defendant denied the application, noting that Plaintiffs were still
14 engaged in litigation against Defendant. Defendant stated,

15 As you know, in March 2004, State Fund offered to reinstate
16 Cumbre and all other terminated brokers effective August 1,
17 2004, on certain conditions. One of those conditions was that
18 the broker not be engaged in litigation against State Fund
19 concerning the broker termination program. . . . Consequently,
to the extent your clients wish to seek reinstatement as
brokers having contractual relationships with State Fund, that
process should not occur prior to the resolution of the
pending litigation.

20 Complaint, Exh. B.

21 Plaintiffs filed the present lawsuit on June 17, 2009.
22 Plaintiffs claim the latest denial unconstitutionally conditioned
23 their broker application on relinquishing their “fundamental right
24 of access to the courts, which is part of the right to petition the
25 government for redress of grievances provided for in the First
26 Amendment to the United States Constitution.” Complaint ¶ 11.
27 Plaintiffs seek a preliminary injunction requiring Defendant “to
28 enter into broker agreements with plaintiffs on the same terms and

1 conditions as [Defendant] contracts with its other newly appointed
2 brokers." Id. at ¶ 12.

3 LEGAL STANDARD

4 I. Motion for a Preliminary Injunction

5 "A plaintiff seeking a preliminary injunction must establish
6 that he is likely to succeed on the merits, that he is likely to
7 suffer irreparable harm in the absence of preliminary relief, that
8 the balance of equities tips in his favor, and that an injunction
9 is in the public interest." Winter v. Natural Res. Def. Council,
10 Inc., ___ U.S. ___, 129 S. Ct. 365, 374 (2008). "[T]he required
11 showing of harm varies inversely with the required showing of
12 meritoriousness." Indep. Living Ctr. of S. Cal., Inc. v. Shewry,
13 543 F.3d 1047, 1049 (9th Cir. 2008) (quoting Rodeo Collection, Ltd.
14 v. W. Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987)). "When the
15 balance of harm 'tips decidedly toward the plaintiff,' injunctive
16 relief may be granted if the plaintiff raises questions 'serious
17 enough to require litigation.'" Id. (quoting Benda v. Grand Lodge
18 of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308,
19 315 (9th Cir. 1978)).

20 II. Motion to Dismiss for Failure to State a Claim

21 A complaint must contain a "short and plain statement of the
22 claim showing that the pleader is entitled to relief." Fed. R.
23 Civ. P. 8(a). When considering a motion to dismiss under Rule
24 12(b)(6) for failure to state a claim, dismissal is appropriate
25 only when the complaint does not give the defendant fair notice of
26 a legally cognizable claim and the grounds on which it rests.
27 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
28 considering whether the complaint is sufficient to state a claim,

1 the court will take all material allegations as true and construe
2 them in the light most favorable to the plaintiff. NL Indus., Inc.
3 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
4 principle is inapplicable to legal conclusions; "threadbare
5 recitals of the elements of a cause of action, supported by mere
6 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
7 ___ U.S. ___, 129 S.Ct. 1937, 1949-50 (2009) (citing Twombly, 550
8 U.S. at 555).

9 DISCUSSION

10 Plaintiffs argue that there is a sufficient likelihood that
11 they will succeed on the merits of their constitutional claim to
12 support the grant of a preliminary injunction. Defendants assert
13 that Plaintiffs' claim is barred by res judicata.

14 Res judicata, also known as claim preclusion, prohibits the
15 re-litigation of any claims that were raised or could have been
16 raised in a prior action. W. Radio Servs. Co., Inc. v. Glickman,
17 123 F.3d 1189, 1192 (9th Cir. 1997) (citing Federated Dep't Stores,
18 Inc. v. Moitie, 452 U.S. 394, 398 (1981)). The purpose of res
19 judicata is to "relieve parties of the cost and vexation of
20 multiple law suits, conserve judicial resources, and, by preventing
21 inconsistent decisions, encourage reliance on adjudication." Marin
22 v. HEW, Health Care Fin. Agency, 769 F.2d 590, 594 (9th Cir. 1985)
23 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). Res judicata
24 operates where there is "1) an identity of claims, 2) a final
25 judgment on the merits, and 3) identity or privity between
26 parties." W. Radio, 123 F.3d at 1192 (citing Blonder-Tongue Labs.
27 v. Univ. of Ill. Found., 402 U.S. 313, 323-24 (1971)). To
28 determine the preclusive effect of a state court judgment, the

1 court looks to state law. Manufactured Home Cmty. Inc. v. City of
2 San Jose, 420 F.3d 1022, 1031 (9th Cir. 2005).

3 Plaintiffs do not dispute that the parties in the two actions
4 are identical. Plaintiffs first dispute that the state appellate
5 court's decision, which "conclude[d] that [Plaintiffs] cannot
6 establish that [Defendant's] conditional reinstatement offer
7 resulted in a deprivation of a constitutional right," constitutes a
8 final state court judgment. RJN, Exh. 25 at 47. The "finality
9 required to invoke the preclusive bar of res judicata is not
10 achieved until an appeal from the trial court judgment has been
11 exhausted or the time to appeal has expired." Franklin & Franklin
12 v. 7-Eleven Owners, 85 Cal. App. 4th 1168, 1174 (2000). Plaintiffs
13 assert that, because other causes of action were remanded back to
14 the trial court and those causes of action are currently on appeal,
15 the judgment is not final.

16 Plaintiffs rely on Fury v. City of Sacramento, 780 F.2d 1448,
17 1452 (9th Cir. 1986), for support. Fury was a takings case in
18 which Fury claimed that a re-designation of his land as open space
19 constituted a taking for which he should be compensated. Fury
20 initially filed complaints in both federal and state court. The
21 federal court abstained from hearing the case until the state court
22 resolved the state constitutional claims, but reserved jurisdiction
23 to determine any issues of federal constitutional law, if
24 necessary. Furey v. City of Sacramento, 24 Cal. 3d 862, 870
25 (1979). The state trial court sustained Defendant's demurrer and
26 dismissed the action. On appeal, the California Supreme Court
27 affirmed the dismissal with respect to two of the plaintiff's
28 takings theories, but reversed and remanded with respect to the

1 third theory. Thus, the California Supreme Court did not issue a
2 final judgment on the third takings theory. After the California
3 Supreme Court handed down its decision, the plaintiff did not
4 further pursue his state court action. Instead, the plaintiff
5 reactivated his federal action by filing an amended complaint,
6 which asserted only a federal constitutional claim. The federal
7 constitutional claim pursued was based on the same takings theory
8 that the California Supreme Court allowed him to pursue. When
9 reviewing the plaintiff's federal claims, the Ninth Circuit noted
10 that res judicata did not apply because the plaintiff's "claim in
11 this action raises only issues of federal constitutional law."
12 Furey, 780 F.2d at 1453 n.3. The Ninth Circuit stated that the
13 federal court "explicitly retained jurisdiction over the federal
14 issues" and "the state court action was not pursued to final
15 judgment." Id. (internal citations omitted).

16 Furey does not establish that an interim decision of the
17 California Court of Appeal lacks preclusive effect. Moreover,
18 Furey is distinguishable. In the present case, the court of appeal
19 decision is final as to Plaintiff's constitutional claim. After
20 the court of appeal issued its decision, Plaintiffs filed a timely
21 petition for rehearing on the constitutional claim, which was
22 denied. Thereafter, the court of appeal issued a remittitur, which
23 finalized the court of appeal's decision. Plaintiffs did not file
24 a petition for review with the California Supreme Court.

25 The remittitur terminates the court of appeal's jurisdiction
26 over the case and re-vests jurisdiction in the trial court subject
27 to the limitations set forth in the opinion. People v. Dutra, 145
28 Cal. App. 4th 1359, 1366 (2006). Because the trial court had

1 jurisdiction only over the two remaining causes of action, and not
2 the constitutional claim, the court of appeal's judgment is final
3 as to the constitutional claim.

4 Plaintiffs also dispute that the 2009 complaint is based on
5 the same claim as the prior cause of action that was dismissed.
6 To determine the likeness of the claims, California utilizes the
7 primary right theory. Mycogen Corp. v. Monsanto Co., 28 Cal. 4th
8 888, 904 (2002).

9 Under this theory, a "cause of action" is comprised of a
10 "primary right" of the plaintiff, a corresponding "primary
11 duty" of the defendant, and a wrongful act by the defendant
12 constituting a breach of that duty. . . . [T]he primary right
13 is simply the plaintiff's right to be free from the
14 particular injury suffered. It must therefore be
15 distinguished from the legal theory on which liability for
16 that injury is premised . . . The primary right must also be
17 distinguished from the remedy sought: The violation of one
18 primary right constitutes a single cause of action, though it
19 may entitle the injured party to many forms of relief, and
20 the relief is not to be confounded with the cause of action,
21 one not being determinative of the other. [T]he harm
22 suffered is the significant factor in defining a primary
23 right.

24 Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers
25 Cas. & Sur. Co. of America, 133 Cal. App. 4th 1319, 1327 (2005)
26 (internal citations and quotations omitted). Plaintiffs allege
27 that Defendant's 2009 rejection of Plaintiffs' brokerage
28 application and Defendant's 2004 rejection involve separate and
distinct facts and, therefore, are not identical. Although the
rejections occurred five years apart, the "harm suffered" by
Plaintiffs has not changed over the years. In both cases
Plaintiffs allege the same wrong -- Defendant's conditioning the
opportunity to do business with it on the dismissal of the same
ongoing litigation. Defendant's March, 2009 rejection of
Plaintiffs' broker applications is nothing more than a reiteration

1 of the same act that constituted the alleged constitutional
2 violation in the previous case. Therefore, Plaintiffs have not
3 alleged any new facts to avoid the preclusive effect of res
4 judicata.

5 Plaintiffs argue that res judicata should not apply because
6 the court of appeal's decision did not rule on his claim of an
7 unconstitutional condition. Plaintiffs assert that the court of
8 appeal "mischaracterized Cumbre's Section 1983 claim as 'impairment
9 of access to the courts'." Motion for Preliminary Inj. at 13.
10 This argument has no merit. Plaintiffs characterized their own
11 claim as one of access to the courts under the petition clause of
12 the First Amendment. The appellate court specifically addressed
13 Plaintiffs' "claim[] that State Fund violated its First Amendment
14 right by impeding its access to the courts." RJN Ex. 25 at 41.
15 After discussing whether Plaintiffs had an adequate remedy
16 available in state court, the court held, "We conclude that Cumbre
17 cannot establish that State Fund's conditional reinstatement offer
18 resulted in a deprivation of a constitutional right." Id. at 47.
19 Further, Plaintiffs raised this issue in their petition for
20 rehearing, which was denied.

21 Accordingly, the Court concludes that res judicata bars
22 Plaintiffs' claim.

23 CONCLUSION

24 For the foregoing reasons, the Court denies Plaintiffs' motion
25 for a preliminary injunction (Docket No. 8) and grants Defendant's
26 motion to dismiss (Docket No. 14). Because amendment would be
27 futile, the Court dismisses Plaintiffs' complaint with prejudice.
28 The Clerk shall enter judgment and close the file. Defendant shall

1 recover its costs from Plaintiffs.

2 IT IS SO ORDERED.

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4 Dated: September 22, 2009



CLAUDIA WILKEN
United States District Judge

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